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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1924

UNITED STATES OF AMERICA, PLAINTIFF IN error
v.
THE ARCHIBALD MCNEIL & SONS CO., INC. } No. 444

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

STATEMENT

At the suit of The Archibald McNeil & Sons Company, the District Court for the Eastern District of Pennsylvania rendered a judgment against the United States for $17,041.75, together with interest amounting to $4,330.36, a total of $21,372.11, and this writ of error brings up that judgment for review. The contention of the United States is that the court below was without jurisdiction to render the judgment, and that is the sole question presented. The District Judge made a certificate (p. 62) pursuant to the Act of Congress which is now Section 238 of the Judicial Code.

The plaintiff sought to recover for coal used by the Director General of Railroads in the operation of the Boston & Maine and Maine Central railroads during the period of Federal control, and the contention of the United States is that such action was maintainable only against the Director General of Railroads, or, after he ceased to operate the railroads, against the Agent of the President.

THE FACTS

From the Statement of Claim it appears that The Archibald McNeil & Sons Company was a Connecticut corporation, and it is alleged that jurisdiction of the action arises under the Fifth Amendment to the Constitution of the United States and under the Tenth Section of the Act of August 10, 1917, Chap. 53, 40 Stat. 276, commonly called the Lever Act; that by virtue of the authority conferred by that Act the President, acting by and through the Fuel Administrator, commandeered and requisitioned certain coal owned by the plaintiff (p. 3) and that the coal was used in the operation of the Boston & Maine and Maine Central railroads (p. 4). It was alleged that the fair and reasonable value and true market price of the coal was not less than the amount fixed by the Fuel Administrator for New River coal for export, to wit, $4.536 per ton, amounting in all to $17,422.32, which is substantially the amount for which judgment was rendered. It is averred

that the plaintiff is entitled to just compensation and that it " has made for the space of three years every effort to collect the value of the said coal so commandeered and requisitioned, and that no part of said sum has been paid by or on behalf of defendant to plaintiff " (p. 5). It is nowhere alleged that the President ascertained or attempted to pay just compensation for the coal or that any of the procedure provided by Section 10 of the Lever Act was ever followed.

The United States filed a motion to dismiss on the ground that the plaintiff was a Connecticut corporation and a citizen and resident of that State, and that by reason thereof the action had been brought in the wrong district (p. 6). The court denied that motion in an opinion appearing at pages 6 to 8, holding that under the Lever Act the right to bring an action against the United States was not limited to any district, whereas under the Tucker Act action could be brought only in the district of the plaintiff. To this ruling the United States excepted (p. 8).

Thereupon the United States filed an affidavit and supplemental affidavit of defense raising questions of law (pp. 9, 10). These affidavits raised the points that the statement of claim failed to set up a cause of action against the United States cognizable in the District Court for the Eastern District of Pennsylvania; that the complaint set forth a diversion of coal under the provisions of

Section 25 of the Lever Act, instead of a requisition under Section 10 of the Act, and that plaintiff's remedy, if any, was by a suit against the Agent designated by the President under Section 206(a) of the Transportation Act. These points were overruled in an opinion set forth at pages 10 to 15.

Thereupon an affidavit of defense was filed (p. 16) averring that no action was taken by the United States against the plaintiff under Section 10 of the Lever Act; that the coal was purchased under contract from F. R. Long & Co. by the Boston & Maine and Maine Central railroads while under Federal control and used by them for their general transportation purposes, and that the coal was never commandeered or requisitioned by the President under Section 10 of the Lever Act. The case then went to trial, a jury being waived by stipulation in writing (p. 17), and resulted in the judgment now under review. The evidence consisted very largely of telegrams and other documents, and the court filed a written opinion (pp. 58–60).

In view of the single contention now made it is sufficient to say that there was and is now no dispute between the parties as to the relevant facts, which, to state them in the language of Judge Dickinson in his decision, are—

> that as a war measure the United States, through its Director General of Railroads,

> took over the administration of railroads, and through its Fuel Administrator the direction and control of the coal supply of the country. And still another is that at the time to which the statement of claim in this case refers the Fuel Administrator was without the personnel of an organization, and for the purposes of this and other like cases was loaned the organization of the Director of Railroads for fuel administration service (p. 58).

What was actually done with the coal is shown by Defendant's Exhibit 1, page 48. It was shipped from the mines by Jamison Coal & Coke Company to their account in the Tidewater Coal Exchange at Port Richmond. On arrival at Port Richmond, on account of congestion the coal was reconsigned by the Bituminous Coal Distribution Committee, at the request of the Tidewater Coal Exchange, to the same consignee at Port Reading, New Jersey. After it reached Port Reading it was dumped by the Port Reading Railroad for account of F. R. Long & Co. by orders of the Tidwater Coal Exchange and, upon authority granted by the Chairman of the New England District Coal Committee, the Exchange ordered the coal dumped for Long's account into vessels consigned to the Boston & Maine Railroad and to the Maine Central Railroad.

The Tidewater Coal Exchange (p. 24) was an organization created at the request of the Council

of National Defense by the shippers and transshippers of bituminous coal, and the Tidewater railroads handling such coal at New York, Philadelphia, Baltimore, and Hampton Roads, for the purpose of expediting the release of cars at those ports in the loading of vessels so as to increase the car supply, in order to increase the production of coal which was moving. The idea was to classify coal from various mines into pools according to grade, etc., and have the coal consigned to the Exchange for the account of its owner and distributed by the Exchange without regard to the original ownership, in order to avoid delay in waiting for the owner's own coal to arrive for his particular vessel. This was a voluntary association at first, but the Fuel Administrator, by order of November 6, 1917 (p. 46), made it compulsory for all shippers to ship their coal to the Exchange and be governed by its rules, and the Tidewater railroads agreed to pay the operating expenses of the Exchange for the benefits they derived therefrom in the way of car saving (p. 24). When the Railroad Administration began to function, it approved of the railroad contracts and continued to support the Exchange until Federal control terminated.

Dr. Garfield's order compelling all shipments to come through the Exchange was cancelled as of March 1, 1919, but the Exchange continued in operation until April 30, 1920, by voluntary mem-

bership. On November 1, 1919, as shown by Exhibit 13, page 45, the Railroad Administration restored the Tidewater Coal Exchange as a means of aiding in the distribution of coal.

Following this order, the Regional Director provided a form on which all consumers of coal made application to the Tidewater Coal Exchange for the coal required, which application contained an agreement to pay for the coal. This application would be either approved, modified, or disapproved by the Commissioner of the Exchange, who would, in turn, forward it to the Regional Coal Committee in Philadelphia, which, if it saw fit, would issue a permit to deliver the specified quantity of coal on the order. This permit would be returned to the Tidewater Coal Exchange, which would place the order with the Pier Agent of the Railroad Company to load the coal for the account of the party making the application or his supplier of coal. Coal for New England, however, for a period of five or six weeks, was handled on direct telegraphic request of W. T. Lamoure, Chairman of the New England Subcommittee at Boston. On receipt of telegrams from him, the Exchange would place the orders direct with the pier. Apparently, that was what was done with the coal in question.

It is evident, therefore, that this method of handling coal was not intended by the parties as a commandeering by the United States within the

meaning of Section 10 of the Lever Act. It was purely a method growing out of the necessities of the situation, first, to release coal cars by allowing them to unload immediately upon arrival at Tidewater ports without reference to the ultimate destination of the coal; and, second, to increase the supply of coal by enabling these cars to become available immediately for new loading. The understanding of all the parties was that the ultimate consignee of the coal should pay for it. In the order establishing priority the railroads stood at the head of the list, then followed the Army and Navy and other Departments of the Federal Government, State and County departments and institutions, public utilities, retail dealers, and so forth (p. 54). Pursuant to this scheme, the coal in question was diverted to the New England railroads, used by them, and apparently payment made therefor to F. R. Long & Co. (p. 26) upon some basis not shown.

ARGUMENT

The Court below was without jurisdiction to render the judgment now brought up for review

I

Of course no court has jurisdiction to entertain a suit against the United States unless authority to bring the suit be conferred by statute. Though the first pleading may upon its face contain allegations sufficient to indicate jurisdiction,

the objection that jurisdiction does not exist may be taken by answer, and when it appears from the facts that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the District Court it is the duty of the court to proceed no further but to dismiss the suit. (*Judicial Code*, Sec. 37; *Northern Pacific Steamship Company* v. *Soley*, 257 U. S. 216.) Whatever, therefore, the allegations in the statement of claim to the effect that the suit was brought under Section 10 of the Lever Act by reason of the fact that the President had commandeered coal pursuant to the provisions of that Act, when it appeared that the coal was not thus commandeered but was really diverted by the Fuel Administrator for the use of railroad companies which were at the time being operated under Federal control, the suit should have been dismissed, for the District Court had no jurisdiction to entertain a suit against the United States for coal thus diverted and thus used.

If the question of jurisdiction is in issue, and the jurisdiction is sustained, and judgment on the merits rendered in favor of the plaintiff, the defendant may bring the case directly to this Court upon the jurisdictional point. (*United States* v. *Jahn*, 155 U. S. 109.)

II

If these two railroads had not been under Government control at this time, and the coal had been

diverted to their use by the Fuel Administrator under preference regulations and the railroads had not paid for it, it will undoubtedly be conceded that the only remedy would lie in separate actions against each railroad company. This court has decided that compliance with regulations of the Fuel Administrator, even though a loss is thereby incurred, will not support an action against the United States. (*Morrisdale Coal Company* v. *United States,* 259 U. S. 188; *Pine Hill Coal Company* v. *United States,* 259 U. S. 191.)

The fact that the railroads were under Federal control does not alter the principle. While Federal control lasted the plaintiff could have sued the Director General for this coal under the Act of March 21, 1918, Chap. 25, 40 Stat. 451, and General Order No. 50. (*Missouri Pacific Railway Co.* v. *Ault,* 256 U. S. 554.) After Federal control ceased the plaintiff could have sued the Agent designated by the President under Section 206(a) of the Transportation Act of February 28, 1920, Chap. 91, 41 Stat. 456, 461. That section reads as follows:

> SEC. 206. (a) Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior

> to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes, but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier.

The intent of this section is clear. The Government assumed liability for its acts while operating the railroads and provided an adequate remedy, and, as we claim, an exclusive remedy on any cause of action arising out of Federal operation of a railroad by suit brought against the Agent designated by the President, and such suit must be brought in a court which would have jurisdiction if it were against the carrier rather than the Government. Section 206(b) provides for the service of process upon any agent or officer of the carrier operating the railroad, if such agent or officer is authorized by law to be served with process in proceedings brought against the carrier, and if a contract has been made with the carrier by or through the President for the conduct of litigation arising out of operation during Federal

control, and if no such contract has been made, process may be served upon such agents or officers as may be designated by or through the President. By Section 206(e) provision is made for the payment of judgments out of the revolving fund created by Section 210.

Each railroad operated under Federal control was operated as a separate entity. (*Missouri Pacific Railroad Company* v. *Ault*, 256 U. S. 554.) Therefore on a cause of action arising out of Federal operation of the Boston & Maine Railroad suit must be brought against the Agent designated by the President, and service must be had on an agent of the Boston & Maine Railroad or some person designated by the President, and the action must be brought in a court which would have jurisdiction over the Boston & Maine Railroad.

III

As we have said each railroad under Federal control was operated as a separate entity. The situation was analogous to that which would exist if there were a general receivership of each transportation system. Operation was to be continued as theretofore with the old personnel, subject to change by Executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with the

carriers were not to be affected by the change of control. (*Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554.)

In the latter case Mr. Justice Brandeis, delivering the opinion of the Court, said (pp. 560–562):

> The President took over the physical properties, the transportation systems, and placed them under a single directing head; but he took them over as entities and they were always dealt with as such. Bull. No. 4, p. 113. Each system was required to file its own tariffs. General Order No. 7, Bull. 4, p. 151. Each was required to take an inventory of its materials and supplies. General Order No. 10, id. p. 170. Each Federal treasurer was to deal with the finances of a single system; his bank account was to be designated "(Name of Railroad), Federal Account." General Order No. 37, id. p. 313. Each of 165 systems was named individually in the order promulgating the wage awards of the Railroad Wage Commission. General Order No. 27, id. pp. 198, 200. And throughout the orders and circulars there are many such expressions as "two or more railroads or boat lines under Federal control." See General Order No. 11, id. p. 170. It is this conception of a transportation system as an entity which dominates Sec. 10 of the act. The systems are regarded much as ships are regarded in admiralty. They are dealt with as active responsible parties answerable for their own wrongs. But since levy or exe-

cution upon their property was precluded as inconsistent with the Government's needs, the liability of the transportation system was to be enforced by allowing suit to be brought against whoever, as the party operating the same, was legally responsible under existing law, although it were the Government.

* * * * *

If the cause of action arose while the Government was operating the system the "carrier while under Federal control" was nevertheless to be liable and suable. This means, as a matter of law, that the Government or its agency for operation could be sued, for under the existing law the legal person in control of the carrier was responsible for its acts. See *Gracie* v. *Palmer,* 8 Wheat. 605, 632–633. The title by which suit should be brought—the person who should be named as defendant—was not designated in the act. In the absence of explicit direction, it was perhaps natural that those wishing to sue the carrier should have named the company as defendant when they sought to hold the Government liable. It doubtless seemed, as suggested in *McNulta* v. *Lochridge,* 141 U. S. 327, 331–332, that suit should be brought against the transportation company "by name 'in the hands of,' or 'in the possession of,' a receiver," or Director General. All doubt as to how suit should be brought was cleared away by General Order No. 50, which re-

quired that it be against the Director General by name.

The principle of this case was reaffirmed by this Court in *Davis, Director General,* v. *Donovan* (265 U. S. 257), in which it was held that an action against the Director General for alleged negligence in the operation of one carrier could not be maintained by proof of negligence in operation of another carrier, both under his control. In delivering the opinion of the Court, Mr. Justice McReynolds said (p. 264):

> Here the Director General came into court to defend only against a liability asserted because of the negligence of agents operating the New York, New Haven and Hartford system and not because of anything which might have been done or omitted by those of another system. In such circumstances, under the statute and orders, we think the court could adjudge no liability against him except such as might have been enforced against the New York, New Haven and Hartford Railroad Company before Federal control. Under those conditions the United States consented to be proceeded against. One reason therefor, if any is necessary, seems plain enough. Every system was operated as an entity; its agents and employees knew and carried on its ordinary affairs, but not those of other carriers. The Director General necessarily relied upon the organization of each system and could demand notice suffi-

cient to set the proper one in motion; otherwise proper defenses might not be presented.

In contemplation of the cessation of Federal operation and the return of the properties to their owners, Congress made provision, under the Transportation Act of February 28, 1920, hereinbefore quoted, for bringing and defending suits thereafter, and at the same time *fixed a period of two years within which they must be brought.* The purpose and intent of this legislation was to afford litigants the same right of action that would have existed against a carrier corporation but for Federal control, following the same procedure and practice as if the action were against the corporation and in the same courts, the only difference being in the designation of the agent of the President instead of the carrier corporation out of the operation of the properties of which the action arose, and in fixing a limitation of time as an aid to a speedy liquidation of the vast liabilities.

In the case of *Davis, Agent* v. *Dexter & Carpenter, Inc.,* decided by the Circuit Court of Appeals for the Fourth Circuit on September 29, 1924, not yet reported, the court held, pursuant to its former decision in the same case, 281 Fed. 385, that the agent designated by the President under the Transportation Act of 1920 is liable for just compensation for coal seized by a railroad

during Federal operation. In that case the Government does not deny that suit lies against the agent of the President, and that if anyone is liable, he is the proper defendant.

IV

When, therefore, the plaintiff alleges the use of its coal by the Government in connection with Federal operation of the Boston & Maine and the Maine Central railroads, it would seem to be plain that the plaintiff's remedy is against the agent of the President, under Section 206(a) of the Transportation Act, by separate suits—one as to the coal used upon the Boston & Maine Railroad and the other the coal used on the Maine Central Railroad. This remedy must be regarded as exclusive. If the plaintiff may maintain this action against the United States, then any plaintiff can maintain a suit for alleged breach of contract arising out of Federal operation in the Court of Claims or in a District Court if less than $10,000 is involved.

The Lever Act was passed August 10, 1917, while the railroads were under private operation. At that time no suit could have been maintained against the United States under the Lever Act arising out of the use by a railroad corporation of coal obtained by it through the Fuel Administrator. (*Pine Hill Coal Co. (Inc.)* v. *United States,* 259 U. S. 191.)

After the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451, and General Order No.

50, any suit for coal used upon any railroad under Federal operation must have been brought against the Director General in a court which but for Federal operation would have jurisdiction of a suit against the railroad company, and after Federal Control ceased on March 1, 1920, the suit must have been brought against the agent appointed by the President under that Act. Here was a complete, adequate, and, we claim, an exclusive remedy.

The Government's position is not merely technical. The scheme provided by these statutes was necessary for handling in a practical way the exigencies of operation and thereafter the problems of liquidation and accounting. If the plaintiff's position is right, the door is open to a multitude of cases based upon the use by railroads under Federal Control of coal obtained by the Fuel Administrator, without reference to the district in which the cause of action arose or where the records and evidence necessary to its defense may be found and after the expiration of the two-year statute of limitations.

It would mean that the Government would have to bring witnesses, papers, records, and documents from all over the United States to any district which the plaintiff might select for his own convenience. The Government would therefore be put to great and unnecessary expense. It would not be entitled to call upon the carrier cor-

poration in connection with the operation of whose properties the coal was used to defend the action under a contract for the conduct of litigation made in compliance with Section 206 (b) of the Transportation Act. Claimants who have already received payment from the Director General of Railroads for coal used by a railroad under Federal control might grasp the opportunity to inflate their treasuries by suing the United States under Section 10 of the Lever Act for sums alleged to be due as just compensation over and above the amount already paid, as in the case at bar.

The affidavit of defense averred (p. 16) that the coal was purchased under contract from F. R. Long & Company by the railroad companies; and at the close of the trial the United States offered to prove (p. 46) that the coal was actually paid for by the railroads in question to F. R. Long & Company, and plaintiff's counsel admitted (p. 26)—

> the payment to F. R. Long & Company of certain sums for the coal in suit,

and objected to the offer of proof on the ground that—

> it is irrelevant to show payment to a third party.

This illustrates the practical situation. If this judgment is affirmed, there is no reason why every coal dealer in the United States who furnished coal to the railroads under diversion orders made by the Fuel Administrator and was thereafter

paid the Fuel Administration price should not now sue the United States in any District Court for just compensation upon the t' ory that his coal was commandeered under Section 10 of the Lever Act.

It is to be noted that Section 206 (a) provided that suits against the agent of the President should be brought within two years from the date of the passage of that Act—that is, not later than February 28, 1922. This suit was not brought until November 1, 1922 (p. 1).

The purpose of Congress in fixing a short statute of limitations is obvious. We must all recognize that it is greatly to the public interest that this tremendous liquidation problem arising out of Federal control of the railroads should proceed speedily to a conclusion.

Our contention that the remedy provided by the Transportation Act is exclusive is therefore supported by the strongest considerations of public interest. The allegation that this coal was taken under Section 10 of the Lever Act is a mere pretense. There was no suggestion that such was the fact at the time the transactions occurred. None of the procedure outlined by that section was followed. The coal was diverted pursuant to regulations made under entirely different authority for the purpose of utilizing the country's supply of coal where it was most needed, and with distinct and wholly different intention regarding the payment for the coal and the rights and liabilities of those who owned it and used it.

Judge Dickinson, in his second opinion (p. 12), recognizes the distinction when he says:

> Section 25 of the Act contemplates a wholly different situation. It does not relate to a taking by the United States in the eminent domain sense but the interposition of the aid of the United States in dealing with transportation and supply of fuel under war conditions. Whatever the United States does under Section 25 is an administrative act done in furtherance of the business of transportation companies for them, and in consequence an act to be viewed in law as the act of the Transportation Company.

That is exactly what we claim.

He reasons, however, that since there is no denial of the ultimate liability of the United States, the proposition goes only to the procedural right (p. 15). Indeed, the court below, in rendering its decision, seems to have departed entirely from the proposition that the coal was taken under Section 10 of the Lever Act and to have based its decision really upon the implied contract which arises under the Constitution when private property is taken for the public use, for in his certificate (p. 62) he says:

> The judgment was entered in this case in favor of the plaintiff and against the defendant on the ground that the plaintiff had a right of action against the defendant within the meaning of the Fifth Amend-

> ment to the Constitution of the United States that there shall no " private property be taken for public use without just compensation."

If this is the real ground of the decision, the lack of jurisdiction of the court to make it is obvious. It then becomes an ordinary Tucker Act case, and inasmuch as it involves more than $10,000 the Court of Claims has sole jurisdiction.

In suits against the United States, conditions even though some may regard them in popular parlance as merely " procedural " and " technical " may not be so regarded by courts of the United States.

> Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued those conditions must be complied with. (*Rock Island, etc., R. R. Co.* v. *United States*, 254 U. S. 141.)

And there is no authority anywhere which permits a plaintiff, who deems himself injured by some act of the United States, to frame his cause of action in utter disregard of the known facts and the applicable statutes; select his forum at will, and claim the right to recover, irrespective of Congressional action, under the general terms of the Fifth Amendment.

In conclusion, we quote from the opinion of Judge Aldrich, writing for the Circuit Court of

Appeals for the First Circuit in the case of *Shapley* v. *Cohoon*, 263 Fed. 893:

> In view of the urgent insistence of the petitioner before us, it is perhaps permissible to say that the axiomatic rule that courts should at once dismiss proceedings from their control whenever and however want of jurisdiction is seen, whether upon motion, or upon their own discovery, and at whatever stage of the proceedings the discovery may be made, is quite as imperative as the other well-understood rule that requires courts to be jealous and alert in holding and protecting their proper jurisdiction.
>
> Holding a case after discovery of want of jurisdiction would be delaying and obstructing justice, not administering it. Any attempt to deal with this case here would involve a violation of a plain fundamental rule—a flagrant usurpation which would delay ultimate decision in respect to the petitioner's rights—a usurpation which would entail grievous wrongs and consequences upon both parties, and more particularly upon the petitioner, if she has a case of merit. (Id. p. 894.)

The judgment should be reversed.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

DECEMBER, 1924.

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In the Supreme Court of the United States.

OCTOBER TERM, 1924. NO. 444.

United States of America

vs.

The Archibald McNeil & Sons Company, Inc.

COUNTER STATEMENT OF FACTS.

This case reaches this Court on a Writ of Error raising the question of jurisdiction of the District Court below with Judge's Certificate in accordance with §238 Judicial Code, embodying Act of Congress March 3, 1891. [Transcript of Record, page 62.]

The case below was tried under written stipulation waiving trial by Jury in accordance with §§649 and 700 Revised Statutes [Transcript of Record, page 17]. There was a general judgment in favor of plaintiff [page 60], no special findings, and an opinion of the Court [pages 58–60].

The Statement of Claim [Transcript of Record, pages 3–5] set forth (1) Claim of jurisdiction under Fifth Amendment and §10 of the Lever Act; (2) Shipment of plaintiff's coal for export prior to October 30, 1919, which coal was lying at the piers; (3) Requisition of coal under authority of the Lever Act by the President acting

through the Fuel Administrator, and use of said coal by United States on railroads, then under Federal control; (4) Averments as to value of coal not controverted below or here.

Government moved to dismiss on ground that plaintiff is a citizen of Connecticut and not of Pennsylvania. Trial Judge denied motion and filed opinion [Transcript of Record, pages 6–8].

Government filed Statutory demurrers [Transcript of Record, pages 9–10], and Trial Judge filed opinion overruling objection [pages 10–15]. The principal grounds of demurrer were (1) the requirements with regard to payment of 75% by President, claimed to be condition precedent to any suit; (2) that "taking" was in reality a "diversion" under §25 of the Lever Act; and (3) that any remedy was under Section 206a of the Transportation Act.

The facts developed at the trial were: The coal belonged to the plaintiff, and was, during November and December, lying under the control of the Tidewater Coal Exchange at the Philadelphia and Reading piers. On October 30, 1919, the President, reciting that he acted under the Lever Act, had given full power to the Fuel Administrator [Transcript of Record, page 53], and the Fuel Administrator, on October 31, 1919, also reciting the authority of the Lever Act, had designated "the Director General of Railroads and his representatives to carry into effect" as his agent "diversions of coal" "to railroads" and others [Transcript of Record, page 54]. Baldwin was Regional Director to carry out the orders of the Fuel Administrator [Transcript of Record, page 22]. In such capacity Baldwin notified Howe, Commissioner of Tidewater Coal Exchange [page 22] that "in order to expedite handling, *requisitions* for Tidewater Coal for New England will hereafter be made direct upon you from W. T. Lamoure" [page 32]. This was confirmed by Snyder [page 31], Chairman of Eastern Regional Coal Committee [page 22]. Thereupon a series of orders were issued by direct authority of Lamoure to Howe [page 35] and by

authority of Howe to the coal pier agent [pages 33–34], under which orders the coal in question was requisitioned, shipped to the Boston and Maine and Maine Central Railroads, and used by them. Plaintiff never received one cent for the coal.

The argument below of the Government was that these uncontradicted facts showed what the Government termed a "*diversion*" of the coal and not a "*taking*" under the Fifth Amendment, and that, in any event, the seizure was in accordance with § 25 of the Lever Act and no remedy was afforded by § 10.

The Trial Judge filed an opinion [Transcript of Record, pages 58–60] disapproving of these contentions and entered a general judgment for the plaintiff [Transcript of Record, page 60]. No special findings were asked for or filed.

A Writ of Error was taken direct to this Court under § 238 Judicial Code, and a Certificate of the Trial Judge [Transcript of Record, page 62] was signed as required by that section.

The statement for the Plaintiff-in-Error adds to the foregoing record facts a discussion of the operations of the Tidewater Exchange, not relevant, since there was no evidence that such operations had anything to do with the "taking" of the coal. And the following is stated: "The understanding of all the parties was that the ultimate consignee of the coal should pay for it" [at page 8]. This is categorically denied and the Government is challenged to substantiate such a statement by the Record.

ARGUMENT.

Since this case is here on writ of error pursuant to a certificate of the trial judge under § 238 of the Judicial Code (embodying Act of March 3, 1891) [Transcript of Record, page 62], no question save that of jurisdiction is involved. That, however, divides itself into two questions:

A. That of *venue*, on the ground that the United States was suable only in the State of the plaintiff's incorporation, and not in the State where the "taking" occurred and the records existed;

B. That of the existence of such a claim to a right of action under § 10 of the Lever Act [40 Stat. 276], as would give jurisdiction to a Federal Court to determine it.

A. The Question of Venue.

The course of the plaintiff below was to follow the thought of this Court expressed in United States *vs.* Seaboard Air Line Ry. Co., 261 U. S. 299, wherein it is said: "The Constitution safeguards the right and § 10 of the Lever Act directs payment"—at page 306. The language of this § 10 is:

> "Jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies."

Now comes the United States and claims that such suits must be in the district of the plaintiff's residence. Why? There is no limitation in the Act. The United States is as present in Pennsylvania as in Connecticut; there the "taking" was done; there the records are. The several statutes providing for suits against the United States, including the Judicial Code, are careful to state the venue in particular suits; but nowhere is there any general provision or principle of law to be found which makes the State of plaintiff's residence the criterion for jurisdictional venue, save where it is specifically stated, as in the provision respecting diverse citizenship (Judicial Code § 51), or in the Tucker Act § 5 (24 Stat. 505).

Impliedly, this question was ruled in Houston Coal Co. *vs.* United States, 262 U. S. 361. Although the point is not mentioned in the opinion of this Court, it was raised in the Court below, and was of course implicit in a writ of error taken under § 238 of the Judicial Code. The Court below said: "It is urged by the Government that the venue is not here because the plaintiff corporation is a citizen of West Virginia." (Transcript of Record in Houston Coal Co. *vs.* United States, No. 365 Oct. Term 1922, p. 7). But the point was left undecided by the District Court because the case was there determined on other grounds.

A Court will not read into a remedial statute limiting clauses which have not been placed there by Congress. Moreover, as is seen in the policy of the Act of September 19, 1922 (42 Stat. 849), the place where the cause of action arose is not essentially an improper venue.

B. The Question of Jurisdiction Proper.

The position of the Government that the District Court was without jurisdiction, is not maintainable because:—

I. The District Court had "jurisdiction" within the meaning of Judicial Code § 238 to decide the controversy, even if it decided it wrong;

II. Under all the facts as disclosed by the Transcript of Record, the rulings of the trial judge are correct.

These two propositions will now be argued:—

I. Jurisdiction Existed, Even Should the Judgment Have Been for the Defendant.

This Court has made it quite clear that its jurisdiction under Judicial Code § 238 to review for lack of jurisdiction below, concerns itself with the jurisdiction of the lower Court as a Federal Court, and is not in any degree equivalent to a motion to dismiss for lack of merit.

In Fauntleroy *vs.* Lum, 210 U. S. 230, it is said: "No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain. One goes to the power, the other only to the duty of the Court. Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has power to do it, and, if it does, the judgment is unimpeachable, unless reversed. Yet a statute could be framed that would make the power, that is, the jurisdiction of the court, dependent upon whether there was a consideration or not. Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense"—at pages 234–5.

Again, in Burnet *vs.* Desmornes, 226 U. S. 145, and in Lamar *vs.* United States, 240 U. S. 60, the same principle

is recognized. In the latter case it is said: "Jurisdiction is a matter of power and covers wrong as well right decisions"—at page 64.

But perhaps the best illustration is the recent case of Binderup *vs.* Pathé Exchange, 263 U. S. 291, wherein this Court thus summarized the result of the cases:

"The contention here," the Court said of the plaintiff in error's argument in that suit, "seems to be broadly that where the cause of action is based upon an Act of Congress, unless the complaint states a case within the terms of the Act, the Federal Court is without jurisdiction."

> "Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the Court as a Federal Court; and this jurisdiction cannot be made to stand or fall upon the way the Court may chance to decide an issue as to the legal sufficiency of the facts alleged, any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it. Jurisdiction, as distinguished from merit, is wanting only when the claim set up in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit * * *. In that event the claim of federal right under the Statute, is a mere pretence and, in effect, is no claim at all."

Now, reading the instant case in the light of these decisions, we find that it was tried in the District Court under written stipulation waiving a jury trial. [Transcript of Record, page 17.] There were no special findings but only a general judgment [page 60]. There is no bill of exceptions but a judge's certificate under

§ 238 Judicial Code [page 62]. Under these circumstances, the Statement of Claim is all that is before this Court to examine whether its averments show jurisdiction. The case of Lehnen *vs.* Dickson, 148 U. S. 71, is a leading authority; and it is there held that, where a case is tried by a judge under the provisions of §§649 and 700 R. S., the right of this Court to review a general finding will be "limited to the sufficiency of the complaint and the rulings, if any be preserved, on questions of law arising during the trial." The recent case of Vicksburg, &c. Rwy. Co. *vs.* Anderson-Tulley Co., 256 U. S. 408, is to the same effect.

The Statement of Claim herein [Transcript of Record, pages 3–5] was modeled, as examination will reveal, on that in United States *vs.* New River Collieries Co., 262 U. S. 341, and the only material difference is that in the case cited the "taking" was for the benefit of the Navy, whereas in the one at bar the "taking" was, under authority of the Lever Act, by "the President of the United States, acting by and through the Fuel Administrator" and the "coal was received, accepted, retained and used by the United States of America, and used in the operation of various railroads, to wit: Boston & Maine Railroad, Maine Central Railroad; which said use was a public use connected with the common defense." [Transcript of Record, pages 3–4.]

We find next that this § 10 of the Lever Act provides "that the President is authorized, from time to time, to requisition foods, feeds, *fuels*, and other supplies necessary to the support of the Army or Navy, or any other public use connected with the common defense"; that "just compensation" shall be paid, with right to sue the United States; and then the clause concludes: "Jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies."

How can any doubt exist as to the legislative meaning? The suggestion of the Government below was that, since the Statement of Claim discloses that the requisitioning was for the benefit of the railroads, then under

Federal Control, and not for an arm of the Government like the Army or Navy, the use was not a "public use connected with the common defense," and suit under the Lever Act cannot be successfully maintained. But these are questions as to the merits and not of the jurisdiction. If a man's property be requisitioned, and he sues under the section under discussion, surely the "*power*," that is the jurisdiction, exists to determine every relative question, including interpretation of the section and of the extent of the remedy afforded by it. There is no ambiguity, no suggestion that every issue of law as well as of fact is not within the "power" of the judge to determine. An examination of the Transcript of Record [pages 9 and 10] shows that the legal objections to the Statement of Claim were raised by statutory demurrer (as they should have been) and are really not points of *Federal* jurisdiction at all, even though they sought the dismissal of the suit as showing no cause of action. Indeed, the contention of the Government is foreclosed by the decisions in United States *vs.* Pfitsch, 256 U. S. 547, and in Houston Coal Co. *vs.* United States, 262 U. S. 361.

In the Houston Coal Co. case, the District Court had dismissed for want of jurisdiction on the ground that the provisions in § 10 of the Lever Act providing for payment of 75% of the President's award were conditions precedent for jurisdiction, and that, accordingly, when it appeared that plaintiff had been paid 100%, jurisdiction was defeated. That case, like the one at bar, was brought here under § 238 of the Judicial Code, and this Court said:

> "The Lever Act was passed in view of the constitutional provision inhibiting the taking of private property for public use without just compensation. It vested the President with extraordinary powers over the property of individuals which might be exercised through an agent at any place within the confines of the Union with many consequent hardships. * * *

> "It reasonably may be assumed that Congress intended the remedy provided by each section should be adequate fairly to meet the exigencies consequent upon contemplated action thereunder and thus afford complete protection to the rights of owners. Considering this purpose and the attending circumstances, we think § 10 should be so construed as to give the district courts jurisdiction of those controversies which arise directly out of requisitions authorized by that section."

It is confidently urged that this reasoning applies to the instant case. The suit was brought under the Lever Act, the coal was taken by the United States, and all questions of the use made of the coal, and of the extent of the remedy, were and are questions as to the merits; which issues the court below had "*power*" to determine. Such determination of controversial issues of law and of fact cannot be reviewed as an issue of jurisdiction under § 238 of the Judicial Code; and surely there is nothing colorable in the claims made below, all of which were determined in favor of the plaintiff by a painstaking, able, and learned trial judge. To repeat, the points made by the Government below were questions of substantive and adjective law and not of jurisdiction.

II. Under the Whole Record the Rulings of the Trial Judge Were Correct.

There is nothing in the entire record of this case which requires plaintiff to rely on any technicality of pleading or other subtlety. Whether or no § 10 of the Lever Act confers jurisdiction to decide all questions arising in a suit brought in good faith under it (as would seem to be the inevitable result of Houston Coal Co. *vs.* United States, 262 U. S. 361); whether or no a general finding when a suit is tried under R. S. § 649 precludes examination of more than the Statement of Claim; the more one inquires into all the facts and all the considerations of law applicable, the more will he be convinced of the unassailable justice and technical strength of plaintiff's claim. The case will accordingly now be argued on the broadest grounds as though every feature of the record were open for discussion.

The Counter-Statement of Facts, *supra*, pages 1–3, makes clear four points:—

> *First*, plaintiff was deprived of his coal;
>
> *Second*, the deprivation was by order of the Fuel Administrator;
>
> *Third*, plaintiff never received one cent of compensation;
>
> *Fourth*, plaintiff brought suit, setting forth a right given by the Fifth Amendment and a remedy under the Lever Act, proceeding under § 10 thereof.

We have to consider the objections raised by the Government with detail, doubtless unnecessary because of any difficulty in respect of the principles of law applicable, but put forward because of the issue of financial life and death to the plaintiff.

Even so, we will not reargue the suggestion, foreclosed by Houston Coal Co. *vs.* United States, 262 U. S. 361, that the requirements with respect to payment of 75% of the Government award are conditions precedent of jurisdiction.

The grounds for a dismissal of the suit chiefly urged by the Government in the court below, were:

1. That use on the railroads of coal seized by the Fuel Administrator, was not a "public use connected with the common defense," although such railroads were then under Federal Control;
2. That the "taking of Plaintiff's coal was not a "taking" such as was contemplated by the Fifth Amendment, but was a "diversion" made under § 25 of the Lever Act, affording no remedy under that Act;
3. That remedy, if any, was only under § 206a of the Transportation Act [41 Stat. 456] subsequently passed; action thereunder being now barred by the limitation contained therein.

The last two points seem to be those insisted on in the Brief just filed in this Court.

1. THE USE MADE WAS A "PUBLIC USE CONNECTED WITH THE COMMON DEFENSE."

There are precedents which emphasize the fallacy of the position of the Government on this point. The Federal Control Act [40 Stat. 451] was avowedly legislation based on the War Power; § 16 stated "that this Act is expressly declared to be emergency legislation enacted to meet conditions growing out of war." This was the ground of the decision of this Court in Northern Pacific Rwy. Co. *vs.* North Dakota, 250 U. S. 135; and surely if the railroads were taken into Federal Control by virtue of the War Power, their operation was a "public use connected with the common defense." This situation would have continued until the technical termination of the War by Joint Resolution on March 3, 1921. [41 Stat. 1359]. This Court has held that the moneys of the railroads while under Federal Control are moneys of the United States, and that suits brought by the Director General are suits on behalf of the United States: Chesapeake & Delaware Canal Co. *vs.* United States, 250 U. S. 123; DuPont *vs.* Davis, 264 U. S. 456; Dahn *vs.* Davis, 258 U. S. 421; Missouri Pacific R. R. Co. *vs.* Ault, 256 U. S. 554. Certainly, it was ended by the cessation of Federal Control on March 1, 1920. Therefore, property of individuals requisitioned by the Government for use by the railroads is within the statute. Moreover, in its appropriations, Congress has shown clearly how it regarded the acts of the Fuel Administrator and what was its interpretation of his office. In 1924, it thus appropriates moneys: "For national security and defense, food and fuel administrator, educational, $4.81." [43 Stat. 60.]

But, in any event, if the "taking" were by Government authority, a plaintiff seeking "just compensation" is not concerned with the use made by the United States. That is a legislative question into which the courts will not inquire, save at times where there is an invasion of private right for a private and not a public purpose, and

the owner of the right homes into court to contest and prevent the "taking." Here the question is not raised by the party whose property has been taken and has been used by the United States in the operation of what was then its own agency; and certainly the United States cannot raise such a question to defeat a recovery guaranteed by the Fifth Amendment, after it has enjoyed the benefit of the property taken.

United States *vs.* Lynch, 188 U. S. 445, is a most instructive case on these questions. The issue therein was as to the jurisdiction of the Circuit Court sitting as a Court of Claims, and the nature of a "taking" within the meaning of the Fifth Amendment was discussed. The Court thus put the question:—

> "Was there a taking? There was no proceeding in condemnation instituted by the government, no attempt in terms to take and appropriate the title. There was no adjudication that the fee had passed from the landowner to the government, and if either of these be an essential element in the taking of lands, within the scope of the Fifth Amendment, there was no taking."

But, said this Court, "if for the want of formal proceedings for its condemnation to public use, the claimant was entitled at the beginning of the work, to have the agents of the government enjoined from prosecuting it until provision was made for securing, in some way, payment of the compensation required by the Constitution—upon which question we express no opinion—there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the government as a taking under its sovereign right of eminent domain, demand just compensation. Kohl *vs.* United States, 91 U. S. 267, 374."

So the Court held that "taking" was a *fact* and that a different "construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of

the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors * * *" at page 470.

In the case at bar, the plaintiff of course had no opportunity to dispute the seizure by the Government of its running coal, and surely the nature of the use cannot now be urged by the Government's counsel as a reason for the denial of all compensation. The plaintiff elects to claim compensation and does not raise any question as to the use. The argument is extraordinary that because a use is private, not public, the Fifth Amendment is powerless to protect the citizen.

2. THE DISTINCTION IS NOT SUSTAINABLE THAT THE "TAKING" OF PLAINTIFF'S COAL WAS NOT A "TAKING" SUCH AS WAS CONTEMPLATED BY THE FIFTH AMENDMENT, BUT WAS A "DIVERSION" MADE UNDER § 25 OF THE LEVER ACT, AFFORDING NO REMEDY UNDER THAT ACT.

Lengthy argument will not be devoted to this position of the Government. A diversion to oneself is surely a "taking," and the Fifth Amendment is not dependent for its efficacy upon any trick of legerdemain or any primitive magic imagined to reside in words. If a citizen can be deprived of his property for use by the Government, without compensation to any extent whatever, by the transparent device of calling it a "diversion," there is an end of the protection of the Constitution. Whatever a "diversion" connotes, it certainly contains the idea of a "taking." And, although of course the language used could not be controlling, it is interesting to note what the actors in this matter of the plaintiff's coal thought when they seized it. "REQUISITION" is the word used. Thus,

Baldwin, Regional Director, says: "In order to expedite handling, *requisition* for Tidewater Coal for New England will," etc. [Transcript of Record, page 32].

G. N. Snider, Chairman Eastern regional Coal Committee [page 22] says: "In order to expedite handling *requisitions* for Tidewater coal for New England will," etc. [page 31].

J. W. Howe, Commissioner Tidewater Coal Exchange, says: to Baldwin: "Acknowledging your telegram eleventh file C-C-four dash fifteen ninety one relative *requisition* for Tidewater coal for New England direct upon me from LaMoure" [page 32].

Lamoure, Chairman of the Sub-committee of the Eastern Regional Coal Committee, located at Boston [page 22] says: "Continue to *requisition* Tidewater coal just as heretofore" [page 32].

If there were any issue of fact as to whether the seizure of plaintiff's coal was a "requisition" or a "diversion," that issue has been determined unimpeachably in favor of the plaintiff by the trial judge acting under § 649 R. S.

In the Government's Brief in this Court, however, this argument takes on a new gloss and permits itself a most surprising assumption, so contrary to the actual facts that it is explainable only by the consideration that counsel here were not counsel at the trial.

This unwarranted assumption is that plaintiff had anything whatever to do with the seizures, that the "regulations" of the Fuel Administration were, as to plaintiff, anything but Government seizures of its property while on wheels. The Government Brief says: "If this judgment is affirmed, there is no reason why every coal dealer in the United States *who furnished coal to the railroads under diversions orders made by the Fuel Administration*," etc. [at page 19]. *No* coal jobber furnished coal to railroads under any regulations. The Fuel Administrator directed the "taking" of the coal when on wheels and by this fact altered the destination of the Way Bill.

The Government Brief further says that "compliance with regulations of the Fuel Admintrator, even though a loss is thereby incurred, will not support an action against the United States," citing the Morrisdale and Pine Hill cases [at page 10]. [259 U. S. 188 and 259 U. S. 191.]

Plaintiff was not a miner of coal; it had no opportunity or choice of "compliance" with regulations; it learned, after delay, its coal had been "requisitioned," to use the word of the government agents in the transaction; and after long last, it discovered that no one would admit liability for the appropriated property. It is the acme of irony to be now told that its "compliance" with regulations deprives it of remedy for a constitutional right.

3. THE POSITION OF THE GOVERNMENT IS NOT SUSTAINABLE THAT REMEDY FOR THE PLAINTIFF, IF ANY, IS EXCLUSIVELY UNDER § 206a OF THE TRANSPORTATION ACT SUBSEQUENTLY PASSED.

The Government's position will now be destructively analyzed:

After the passage of the Lever Act [40 Stat. 276] and of the Federal Control Act [40 Stat. 451], the President took control of and operated the railroads as a war measure, and such control lasted till February 29, 1920, when the Transportation Act was passed [41 Stat. 456]. His agent was the Director-General of Railroads. The President also undertook the control of coal distribution. His agent was the Fuel Administrator. In January, 1919, the personnel of the Fuel Administration was scattered but a nucleus was kept alive and its operations were suspended. In October, 1919, a great coal strike threatened. The President at once intervened by Proclamation to restore the control of the Fuel Administrator, finding his authority avowedly in the Lever Act. [Proclamation of October 30, 1919; Transcript of Record, page 53.] The following excerpts from the reports of the Fuel Administrator and of the Director General for the year 1919 exhibit the complete situation and the nature of the action taken:

The "Final Report of the United States Fuel Administrator," signed by H. A. Garfield, says:

"OCTOBER 28, 1919.

"HONORABLE JOSEPH P. TUMULTY,
Private Secretary,
The White House.

"DEAR MR. TUMULTY:—I shall be obliged if you will bring the following to the attention of the Cabinet at its meeting today as a report upon the question whether the Fuel Administration should

undertake the distribution of coal produced in the days immediately preceding November 1st.

"Last Saturday the Cabinet authorized me to confer with Dr. Garfield on this subject * * *

"* * * Dr. Garfield telephoned me yesterday afternoon expressing doubt as to the wisdom of his undertaking to handle this matter through the Railroad Administration and expressing the preference for its being handled through the Secretary of the Interior * * *

"My judgment is that it would be better to request Dr. Garfield to take control of this situation and make the desired allocation not only of coal on hand at the beginning of the strike but of coal produced during the strike. It seems to be it would be unfortunate and would raise unnecessary question to attempt to make a transfer of the functions of the Fuel Administration from Dr. Garfield to any other person.

"I therefore submit the matter for the action of the Cabinet. As I look at it the questions are as follows:—

* * * * * * *

"If the Government desires to control this matter, shall it be done through Dr. Garfield or shall his powers be transferred to another agency of the Government?

"In the absence of such control the Railroad Administration will, of course, take the steps necessary to protect itself, but this will afford no relief to other public utilities and they may lose substantial amounts of coal which will therefore go to consignees who have no corresponding need for it.

"Sincerely yours,

"WALKER D. HINES."

"29 OCTOBER, 1919.

"DIRECTOR GENERAL WALKER D. HINES,
U. S. Railroad Administration,
Washington, D. C.

"DEAR MR. HINES:—I am obliged to you for sending me a copy of your letter of yesterday to Mr. Tumulty. My suggestion, that the proposed distribution of coal be handled through the Secretary of the Interior, grows out of a plan laid before the President last February. As finally elaborated, it involved, as you remember, among other things, the designation of the Secretary of the Interior as Chairman of an advisory committee, composed in equal part of mine workers and operators and having for its object the consideration of all questions affecting either the public or labor and capital engaged in the bituminous coal industry.

"On his return from Paris in the spring, Secretary Baker stated to me that the President approved of the plan and has asked him to inaugurate it. Due to difficulties, of which I am not full informed, the plan was not inaugurated, greatly to my regret, for I believe it would have gone far to prevent the crisis which is now impending. With these circumstances in mind, it naturally occurred to me to suggest that Secretary Lane be authorized to make the proposed distribution of coal. However, the action of Congress in refusing to make an appropriation for the Fuel Administration after July 1 of this year and the ruling of the Comptroller of the Treasurer on the President's proposal to turn over funds—as per the cables exchanged June 11 and 14 last—have left the United States Fuel Administration without power to function in this crisis.

"Your suggestion that I indicate the basis of the distribution and *utilize the Railroad Administration's field force in carrying it out* (italics not in original) raises the question whether it would not be prefer-

able that you be authorized to act in this emergency, especially if for any reason it still seems inadvisable to set up the advisory commission recommended in the plan above referred to.

"I therefore suggest that if action is now to be taken my resignation be accepted and that you or Secretary Lane be appointed United States Fuel Administrator. In view of your intimation that I indicate the basis of the distribution of coal, I venture to suggest further that the following course be pursued in the present crisis:—

"*First:* That the order covering maximum prices of bituminous coal, suspended as of February 1, 1919, be forthwith rescinded, thereby reestablishing Government maximum prices. It is important to note that the price regulations were suspended and not cancelled and that all contracts entered into since that date are subject to the cancellation of the suspension order. In other words, that contracts for prices higher than the maximum Government prices will not stand in the face of such an order.

"*Second:* That all coal in transit be *at once taken over* and distributed and on the basis of the preferential list formerly in force, excepting, of course, munition plants. All coal thus diverted would be billed at the Government's maximum prices.

"*Third:* That the Secretary of War at once issue orders to prevent interference with the production of coal by those who choose to work and with the distribution by Agents of the Fuel Administration.

"Sincerely yours,

"H. A. GARFIELD."

The Report then proceeds as follows:—

"The letter of October 29 to Mr. Hines was read at the meeting of the Cabinet on the morning of

October 30, which was attended by Mr. Hines and Mr. Garfield. The resignation of the latter was not accepted. By order of the President, Government maximum prices were restored and the Fuel Administrator authorized to make such rules or regulations * * * as in his judgment should seem necessary."

The Annual report of the Director General of Railroads for the year 1919 states:—

"The general strike of the mine workers on November 1 resulted in the Fuel Administrator again taking charge of the situation and revoking the suspension of his previous orders regarding coal prices and priorities. At his request and *acting by his authority* the Railroad Administration undertook the distribution of the available supply, and this work was placed in charge of the Director of this Division * * *

"At midnight on October 31 the Railroad Administration *took and held all* of the bituminous coal then in its possession and from that time actively directed the distribution of the entire available supply to all essential consumers, in accordance with the priority orders of the Fuel Administrator."

It is thus conclusively shown that the acts of the Railroad representatives were by authority of the Fuel Administrator, and that the authority of the Fuel Administrator came from (*a*) the Lever Act and (*b*) the Proclamation of the President of October 30, 1919; which authority was exercised by the Order of October 31, 1919, appointing as the Fuel Administrator's agents "the Director General of Railroads and his representatives." [Transcript of Record, page 54.] The Director General's acts *qua* the "taking" or "diversion" or "requisition" of coal (whatever the word used), were done by virtue of the authority transferred to him creating him and his representatives agents of the Fuel Administrator.

It is the failure to recognize this fact and its implications which constitutes the fallacy in the Government's position.

On and after October 30, 1919, then, till the ending of Federal control on March 1, 1920, the Fuel Administrator continued, to use the words of the Report, to "take," "hold," and "distribute" all coal coming into the possession of the railroads. Such action had nothing to do with the regulations affecting *producers*, who were required to ship under certain conditions, and whose situation is considered in Morrisdale Coal Co. *vs.* United States, 259 U. S. 188. No choice was afforded *jobbers* whose coal was on wheels and was "taken" without further ado.

In United States *vs.* Pfitsch, 256 U. S. 547, this Court carefully considered the effect of the several sections of the Lever Act and particularly of § 10. The effect of that decision was to hold that under §§ 12, 16 and 25 jurisdiction was conferred upon the Court of Claims exclusively (except where the amount did not exceed $10,000), and under § 10 upon the District Courts along sitting as common law courts with trial by jury. This Court takes occasion to say that the legislative history of the Act established that this difference was the result not of inadvertence but of deliberate action in the face of opposition.

Under the sections referred to of the Lever Act, the President was given power to requisition: "(*a*) Foods, feeds, fuels," etc., (§ 10): "factory, packing-house, oil pipe line, mine and other plant," (§ 12), and distilled spirits (§ 16). Under § 25, power was given:

(*a*) To fix prices of coal and coke;
(*b*) "to regulate the method of production, sale, shipment, distribution, proportionment or storage thereof."

If, in the opinion of the President, such orders were not satisfactorily obeyed, power of requisitioning the business was given. As above stated, remedies for

requisition were given by right of action in the Court of Claims under §§ 12, 16 and 25, and in the District Courts under § 10.

"Regulations" were authorized by § 25. If such "regulations" were not obeyed, then right of requisitioning a coal mine was given; but there is no evidence of the slightest intent that "regulations" should be so interpreted as to permit of a requisitioning of coal on wheels which should avoid the provisions of § 10 affording "just compensation."

One should first consider the effect of the Statute on acts done thereunder, *prior* to the passage of the Transportation Act, Feb. 28, 1920. [41 Stat. 456.] The individual was guaranteed the right of just compensation by the Fifth Amendment. Congress passed a series of Acts recognizing this fundamental right and affording different means for its recognization and enforcement. Indeed, any act of Congress which did not afford such relief would have been unconstitutional. There is not the slightest suggestion that the provisions of the Lever Act were not fully adequate, and the "takings" authorized thereunder constitutional. But it is a relevant consideration that the interpretations of the Act should be such as to make it constitutional and attribute to Congress the intention, which they undoubtedly possessed, to afford full relief to citizens whose private property was taken for public use. Thus, even if it could be argued that "regulation" under § 25 could mean the requisitioning of coal on wheels, yet a constitutional interpretation would treat such a regulation as amounting to a requisition giving remedy under § 10. The "taking" of coal on wheels from a private owner for the benefit of the Government was undoubtedly a requisitioning. Either such requisitioning permits remedy to be afforded under § 10, or the provisions of § 25 were unconstitutional; a result which this Court will avoid under the rules of statutory construction.

At the period when this coal in suit was taken, to wit, the winter of 1919, the Transportation Act had *not* been

passed. The only constitutional interpretation, therefore, of the power of "taking" offered by the Act was to permit recovery under § 10 or to infer an implied contract and allow recovery under the Tucker Act. But it is quite obvious that it is difficult to infer an implied contract to afford a remedy under the Tucker Act for requisitioning, when, in the very act permitting requisitioning, the remedy is explicit after the discussion of an amendment thereto, giving jurisdiction to the District Courts as courts of common law (see United States *vs.* Pfitsch, 256 U. S. 547). Moreover, the Court of Claims has already held flatly that, under these circumstances, no remedy exists in the Court of Claims but only under § 10 of the Lever Act: Corona Coal Company *vs.* United States, 56 Court of Claims 390; General Chemical Company *vs.* United States, 57 Court of Claims 94. The Government itself in those cases objected to the jurisdiction of the Court of Claims; and indeed it is hard to see how an implied contract could be worked out of the Lever Act in view of the express jurisdiction conferred by § 10. Moreover, the question is not an academic one, because, if the jurisdiction were in the Court of Claims, "taking" would not permit either of a jury trial (United States *vs.* Pfitsch, 256 U. S. 547) or of the recovery of interest (United States *vs.* N. American Company, 253 U. S. 593).

One must therefore conclude that a "taking" is an actual fact and is not a question of metaphysics or of verbiage. Therefore, if a "regulation" was that the coal should be "taken," that constituted precisely a requisitioning, remedy is afforded by § 10 of the Lever Act, and the Court of Claims would have no jurisdiction to afford relief for such a regulative requisitioning.

But, said the government below, "the remedy, if any, was by a suit against the agent designated by the President under Section 206a of the Transportation Act." [41 Stat. 456], [Transcript of Record, page 10.] It is rather extraordinary that the remedy should be under an

act passed months later than the "taking," compensation for which is sought. Of course it was competent for Congress later to afford a different or a cumulative remedy for a transaction which had occurred. But this would not affect the interpretation of the Lever Act, as it stood at the time of passage, with respect to the reconciliation of its constitutionality and with respect to the applicability of remedies under the Tucker Act.

We must examine further into this question:

(*a*) The language and purpose of the Transportation Act were not primarily intended to include suits for requisitions against the United States.

Taking the language as it stands, it speaks of actions arriving out of the "possession, use, or operation by the President of the railroad of any carrier * * * of such character as prior to Federal control could have been brought against such carrier." How can such language be construed to mean exercise of eminent domain by the United States? It is quite evident the statute has in mind a *particular* railroad and liabilities arising out of its "possession, use or operation." The seizure of coal by the Director General was a *general* act done as *agent of the Fuel Administrator* and can not be said to have involved the particular railroad on which the coal was, especially since the coal may have been and often was used by another railroad or even a third party.

The latest decisions of this Court have made it quite clear that no suit will lie against the Director General in his *general* capacity. Davis *vs.* Donovan, 265 U. S. 257. The coal in the case at bar was not requisitioned by the Maine Central or by the Boston & Maine Railroads, but by the President acting through the Fuel Administrator. It would be quite impossible for plaintiff to determine which carloads of coal reached which railroads; and in other cases of the same nature the applications are more far-reaching. Who shall be served with process? Is it (*a*) the one on which the coal in transit

was when it was diverted from consignee? (*b*) The railroad which received it and under new orders passed it on? (*c*) The ultimate consumer? And (*d*) what if the ultimate consumer be a private corporation favored by the kindness of a railroad for whom the coal was first seized? Is a series of bills of discovery to be filled to determine who finally got the coal? Otherwise, who can be sure whom to sue? Often no notices were served, and even a notice proves nothing as to who finally used the coal. Cases exist where the coal passed through ten hands. And in the instant case, where the coal was dumped into barges and mingled with other coal, how can anyone in the world say whether the Maine Central burned in its locomotives all of plaintiff's coal or none of it?

Consideration will uncover the unworkability of the Government's theory as to compensation to the plaintiff. Plaintiff's coal is taken while on wheels and at the Philadelphia & Reading piers by order of the Fuel Administrator. The coal is dumped with a lot of other coal into the barges of Long & Co., with whom plaintiff has no relations at all. Long delivers it to the Maine Central & Boston Maine Railroads. These railroads do not know whose coal it is; they never heard of the plaintiff in that connection; they treat Long & Co. as the owner and pay him. When, long after these events, search by plaintiff develops the facts, The Philadelphia & Reading R. R. will not pay plaintiff because they acted by order of the Fuel Administrator; the Maine Central & Boston Maine Railroads will not pay plaintiff because they did not get the coal from it but received barges full of unsegregated coal from Long & Co., with whom they had a contract. Long & Co. say to plaintiff, "What have we to do with you? We have our own accounts to settle with the Fuel Administrator and we decline to recognize you at all in the transaction." On what theory of law can suit be brought against any of those concerned other than the United States acting through the Fuel Administrator

for what was his act and none's else? The Director General of Railroads is not *generally* responsible (Davis & Donovan, 265 U. S. 257). The Lever Act, § 10, points out the adequate remedy whereas the Transportation Act, § 206a, however properly available in simple cases, affords no real remedy for this plaintiff.

When the bill which became the Transportation Act was before the House, the members of the Committee in charge upon the floor thus explained section 206a:

> "MR. SANDERS OF INDIANA: Those causes of action which arise through Federal control are provided for in this section and by an amendment pending actions are provided for, and this provides that a suit can be brought against the United States Government at any place in the country. It is a very liberal provision for suing the Government. The Government took over these railroads, and operated them, and torts and contract obligations arose, and they are really actions against the Government, and in pursuance of that idea the Director General provided that suits should be brought against him. This carries it on further and makes liberal provision that the United States may be sued in any jurisdiction of the land where he could have been sued." Cong. Rec. Vol. 58 Part 8, page 8400.

Where is there the slightest suggestion here of eminent domain cases? Of a *pro tanto* repeal of the Lever Act? Of the declaration of *exclusive* rights of action?

The truth is that the Transportation Act was an enlarging substantive act whose purpose was to afford redress to the many who suffered under Federal operation and who had been in great doubt and perplexity as to their remedies all over the country. They had had rights of action, but these had been given under Executive Orders for a large part, and the Act of 1918 had not in some respects been construed to afford relief. Accord-

ingly the Act of 1920 was made comprehensive so far as operation went, but it is submitted that no thought can be spelled out that a seizure by the United States under the Lever Act (for which a remedy was expressly given in that Act) was to be exclusively redressed in a multitude of suits against a hundred railroads if one were fortunate to guess aright as to liability. The United States took under one Act; they should answer under that Act.

The above considerations are not intended to support the position that no action would lie against a railroad under an implied contract to pay in the simple case when coal was seized on its lines and used by it, but this is a very different question from the position that the Transportation Act was intended to afford exclusive relief for a "taking" in the nature of a requisition, or that, under the facts of the present case, plaintiff could have been given full relief thereunder.

(*b*) In any event, the passage of the Transportation Act has not the effect of an implied *pro tanto* repeal of § 10 of the Lever Act.

Implied repeals are not favored.

Sutherland on Statutory Construction is perhaps the best authority and he says as follows:—

> "Repeals by implication are not favored. This means that it is the duty of the Court to so construe the acts, if possible, that both shall be operative. * * * There must be such a manifest and total repugnance that the two enactments cannot stand" at pages 465–6.
>
> "A subsequent statute which institutes new methods of proceeding does not, without negative words, repeal a former statute relative to procedure. The statute authorizing a proceeding to contest the validity of a will 'by petition to the court of common pleas' does not repeal the provisions of the

> former statute authorizing a proceeding by bill in chancery. * * * A statute giving a new remedy does not take away a remedy previously existing" at page 498.

State *vs.* Martin, 68 Vermont 93, is a good illustration. Therein was involved a question of remedy for abating a nuisance where a new act had been passed and procedure was based on the old one. The Court said: "A repeal by implication is not favored. Although every statute is, by implication, a repeal of all prior statutes on the same subject, so far as it is contrary and repugnant thereto, and that without any repealing clause, it is not a repeal if it be possible to reconcile the two acts of the legislature together. A repeal by implication is permitted only in cases of very strong repugnancy or irreconcilable inconsistency such as does not exist in this case" at page 94.

In the case of United States *vs.* McGrane, 270 Fed. 761, the suit was under § 10 of the Lever Act for the taking of land under that section. The point argued by the Government was that the Act of March 2, 1919 (40 Stat. 1272) repealed this § 10 of the Lever Act. The Court said:

> "By the Act of 1917, jurisdiction had been 'conferred on the United States District Courts to hear and determine all such controversies,' namely, those arising under the act. No suggestion is now made, and in the absence thereof we are justified in concluding that none were or could have been made to Congress, that the jurisdiction thus conferred by Congress in the District Courts was unsuitable in process or had proved unsatisfactory in performance. In the absence, therefore, of any call for changing this jurisdiction, and in the absence of any expression or implication in the statute to repeal, supersede, or affect the Act of 1917, and in view of the fact that such widespread change in the status of

> the then accrued war claims under it, would naturally and reasonably have been evidenced in express enactments, and not be left to implication, we cannot attribute to Congress, and to the Act of 1919, an intent to repeal the statute of 1917. * * * To turn such a validating, enabling, and enlarging statute into a repealing statute would be to run counter to the spirit and purpose which led to its passage." (At page 763.)

This language is equally applicable to the present contention of the Government that the Transportation Act operates to negative the beneficent intentions of Congress to afford remedy under the Fifth Constitutional Amendment, where railroads received coal from the Fuel Administrator.

But perhaps the most important consideration of all is that Congress seems to have foreseen what might happen in the way of the ingenuities of counsel and to have expressly provided that there should be no mistake in the protection of the constitutional rights of the citizen. § 24 of the Lever Act provides: "That the provisions of this Act shall cease to be in effect when the existing state of war between the United States and Germany shall be terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President; but the termination of this Act shall not affect any act done, or any right or obligation accruing or accrued, or any suit or proceeding had or commenced in any civil case before the said termination pursuant to this Act; but all rights and liabilities under this Act arising before its termination shall continue and may be enforced in the same manner as if the Act had not terminated."

The situation developed in the case of Atlantic Refining Co. *vs.* United States, decided by the Court of Claims on Jan. 14, 1924, is instructive. Certain petroleum products were taken by the Government, which purported to act under the Acts of March 4, 1916 (39 Stat.

1192) and June 15, 1917 (40 Stat. 182). Then came the Lever Act. Suit having been brought in the Court of Claims, the Government objected to the jurisdiction as to all deliveries after Aug. 10, 1917, citing the decision in the case of United States *vs.* Pfitsch, 256 U. S. 547. The Court of Claims reviewed the legislation and held that there should be no application of implied repeal and that, "Congress having granted the authority and provided the remedy, it is difficult to perceive an attempt to materially alter the remedy alone, in the midst of war, and create an incident confusion in the large number of instances where the power had been exercised in good faith under prior laws." By parity of reasoning, the provisions of the Lever Act should not be considered as having been *pro tanto* repealed by the passage of the Transportation act so as to deprive now this plaintiff of his remedy under the Lever Act for acts done by express declaration under the authority of that same Act.

Moreover, the argument that the Transportation Act operated in some fashion to repeal *pro tanto* the remedy afforded by the Lever Act, loses all force when it is perceived that it could not have such an effect with reference to requisitions for the army or navy or any third party save the railroads themselves. In seizing and diverting the coal, the Director General acted avowedly under the orders of the Fuel Administrator and the Fuel Administrator avowedly under the Lever Act [Order of October 31, 1919; Transcript of Record page 54]. The Railroad Administration was therefore not responsible, save perhaps when the railroads themselves used the coal. And then the fact of *use* and not of *taking* is the basis of responsibility: which consideration in itself demonstrates that remedy for the taking provided by the Lever Act § 10, is the one appropriate and adequate remedy.

No: a partial, imperfect repeal of a statutory remedy for acts already done and constitutional rights created, is not to be *implied*. In the case at bar there is no necessary repugnancy whatever between the Transportation Act section 206a and the Lever Act section 10. Both may and should stand together.

It is a relevant fact that the statute of limitations bars actions under the Transportation Act but not under the Lever Act. This is not by chance. Claims arising through torts and contracts should be cleaned up quickly; but a very different situation confronts a man who has to search records for coal that has been taken from him, he knows not how or when or by what agent of the Fuel Administrator. Surely Congress can not readily be presumed to have shut the door in the face of the man whose property they have seized.

The Government's Brief would seem to assume that plaintiff's position is based in some fashion on the fact of Federal Control of the railroads in late 1919. Not at all. The claim may be stated categorically thus:

The Lever Act authorized taking of plaintiff's coal;
The Lever Act provided by § 10 a remedy for requisition;
The "taking" was by the Federal Agency of the Fuel Administrator;
The remedy was by § 10.

It is also true that:

The coal was used by the railroads;
They were then under Federal Control;
This emphasizes the public character of the use: it has no further effect.

It is unnecessary to allow oneself to be led far aside by the assumptions of counsel but one or two points should be noticed:

"If the plaintiff may maintain this action against the United States, then any plaintiff can maintain a suit for alleged breach of contract arising out of Federal operation in the Court of Claims" [at page 17]. What is the possible sequence of reasoning leading to such a conclusion?

"If these two railroads had not been under Government Control at this time, and the coal had been diverted

to their use by the Fuel Administrator under preference regulations and the railroads had not paid for it, it will undoubtedly be conceded that the only remedy would lie against each railroad company" [at pages 9-10]. No such concession will be made! If the so-called "preference regulation" was directed to a miner who furnished the railroad, as in the Morrisdale case, that conclusion would follow. But, if the "preference regulation" were in verity a "taking," the United States would be liable under § 10 of the Lever Act.

"It would seem to be plain that the plaintiff's remedy is against the agent of the President, under Section 206a of the Transportation Act, by separate suits—one as to the coal used upon the Boston & Maine Railroad, and the other the coal used on the Maine Central Railroad. This remedy must be regarded as exclusive" [page 17]. And this in face of the uncontradicted and uncontradictable evidence that, by the Act of the Fuel Administrator, no human power could ever have determined how much, if any, of plaintiff's coal each railroad got!

Finally, the Government Brief allows this amenity to escape: "The allegation that this coal was taken under § 10 of the Lever Act is A MERE PRETENSE." Thus of the judgment of the learned and just judge below, to pass over the firm and considered opinion of counsel! But the Government should certainly not indulge in criticisms of the sincerity of one's colleagues at the bar so long at least as the record in this case and in that of the United States *vs.* Newton Coal Co. (Nos. 709-10) lies open for comparative inspection.

With zeal to deprive coal dealers of all compensation for requisitioned coal used by railroads, counsel, at one and the same time, were filing the following claims of law:

Demurrer in Case at Bar:

"7. Plaintiff's remedy, if any, was by a suit against the Agent designated by the President under section 206 (*a*) of the Transportation Act." [Transcript of Record, page 10.]

Assignment of Error in Newton Coal Co. vs. *Davis, 281 Pa. 34:*

"22. * * * Plaintiff's remedy, if any, was by a suit against the United States in accordance with the provisions of Section 10 of the Act of Congress approved August 10th, 1917, 40 Stat. L. 276."

This is the manner in which the Government argued in the Supreme Court of Pennsylvania:

> "It is submitted that the actions should have been brought against the United States, as what is alleged to have been done by the defendant, namely, the confiscation of the plaintiff's coal, was done by the defendant purely in his capacity as Agent of the Fuel Administrator and had nothing whatever to do with his operation of the railroads. The Transportation Act, Section 206, only allows suits against the Agent designated by the President if based on causes of action arising out of the possession, use or operation by the President of the carriers during Federal Control and it is clear that the causes of action at bar do not arise out of the possession, use or operation by the President of the Railroads involved during Federal Control. They arise out of the regulations issued pursuant to the Lever Act and the mere fact that the Railroads were under Federal Control at the time has no bearing whatever on the matter. If the Railroads had not been under Federal Control the plaintiff's redress for any violations of its rights in having coal seized would have been just the same, that is, by an action against the authority who seized the coal, which was the United States, acting through the Fuel

Administrator and his Agents, in this instance the Agent being the Director General of Railroads, and not by an action against the party to whom the coal was delivered, perhaps without such party's consent.

"Neither the Director General of Railroads, who operated the Railroads during the war, nor the Agent provided for in Section 206 of the Transportation Act, 1920, the latter being the defendant in these two actions, is the United States. * * *

"The mere fact that the Director General of Railroads had been given the authority by the Fuel Administration to make diversions of coal does not change the situation, for in making such diversions he was acting in a different capacity from that in which he acted in receiving coal, as pointed out above and conceded by the Court below. * * *

"It follows from the above that plaintiff cannot recover in these cases because *it should have sued the United States under Section 10 of the Lever Act* and there is no liability to the plaintiff on the part of these defendants who received the coal requisitioned by the Fuel Administration."

So ends the brief signed by the counsel for the Director General operating the Pennsylvania and the Reading Railroads. Comment is unnecessary, but we will indulge just once more in parallel columns:

Government Brief herein [pages 9-10]:

"If these two railroads had not been under Governmental control at this time * * * it will undoubtedly be conceded that the only remedy would lie in separate actions against each railroad company."

Railroad Administration Brief in Nos. 709-10 above quoted.

"If the railroads had not been under Federal Control, the plaintiff's redress for any violations of its rights in having coal seized would have been just the same, that is, by an action against the authority who seized the coal, which was the United States, acting through the Fuel Administrator and his agents, in this instance the agent being the Director General of Railroads, and not by an action against the party to whom the coal was delivered, perhaps, without such party's consent."

Counsel for plaintiff would respectfully urge that not lightly should the Lever Act be declared no longer operative, when that Statute was intended to protect a constitutional right. Stripping the argument of its technicalities, this Court is asked to dismiss the plaintiff hence without pay for his coal and without hope now to secure pay, because plaintiff thought it could rely on the Act of Congress under which its coal was taken. Congress had expressly provided in the Act authorizing "taking" that right of action should survive the termination of the Act; but now the Government says that another Act of Congress (which certainly does not show such intention on its face) would have afforded relief to plaintiff under this and the other pending suits by sending it to over twenty-five different railroads spread over the United States to seek redress for general acts done

in the East by the Director General acting under the orders of the Fuel Administrator; and that, not having divined this situation, plaintiff must now lose all compensation. Even this is not all. For, his right to recovery is to be made to depend on facts that plaintiff could not know. If the coal, in a supposititious case, were seized while on the Baltimore & Ohio lines and sent to the Philadelphia & Reading, plaintiff's remedy under the Transportation Act is said to be against the Philadelphia & Reading *if the latter Company used the coal.* If plaintiff sued the Baltimore & Ohio, it must fail; but again, if the Philadelphia & Reading turned the coal over to another railroad, plaintiff must fail in his suit against the Philadelphia & Reading. While still again, if a third party other than a railroad eventually got the coal, the plaintiff would now return for relief to the Lever Act. And what if the coal, as in the initial case, has lost all identity after being "taken" and before being used? Congress certainly never intended any such results. This Court, by its decision in Davis *vs.* Donovan, 265 U. S. 257, disapproves any *general* suit against the Director General of Railroads, and no *separate* suits could afford plaintiff relief. The intention of Congress in the first instance was to give a remedy for the constitutional right of "just compensation" by § 10 of the Lever Act, and there is not the slightest indication anywhere that the passage of the Transportation Act evinces an alteration of that intent.

It is submitted that the judgment below should be affirmed.

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